United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2001

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ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

L. JOHN JACOBI and ROBERT GAMBERA, individually, on behalf of the members of the AMERICAN ASSOCIATION OF SECURITIES REPRESENTATIVES, and on behalf of all other securities representatives similarly situated,

Plaintiffs-Appellants,

vs.

BACHE & CO., INC.; WALSTON & CO., INC; THOMSON & McKINNON AUCHINCLOSS, INC. (formerly THOMSON & McKINNON, INC.); HORNBLOWER-WEEKS, HEMPHILL, NOYES; LOEB, RHOADES & COMPANY; TUCKER, ANTHONY & R. L. DAY; HARRIS, UPHAM & CO., INC; DOMINICK INT'L. CORP.; HALLE & STIEGLITZ, INC.; GOODBODY & CO., INC; BEAR, STEARNS & CO.; LEHMAN BROS.; KIDDER PEABODY & CO., INC.; R. W. PRESSPRICH & CO., INC.; DEAN WITTER & CO., INC.; W. E. HUTTON; REYNOLDS & CO.; PAINE, WEBBER, JACKSON & CURTIS; SCHEINMAN, HOCKSTIN & TROTTA, INC.; PRESSMAN FROLICH & FROST, INC.; NEWBURGER, LOEB & CO.; RAUSCHER, PIERCE SECURITIES CORP.; OPPENHEIMER & CO.; STEINER ROUSE & CO., INC.; L. F. ROTHSCHILD & CO.; SPENCER TRASK & CO.; SMITH BARNEY & CO., INC.; and THE NEW YORK STOCK EXCHANGE, INC.

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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L. JOHN JACOBI and ROBERT GAMBERA, individually, on behalf of the members of the AMERICAN ASSOCIATION OF SECURITIES REPRESENTATIVES, and on behalf of all other securities representatives similarly situated,

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\- against -

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Defendants-Respondents.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Where the New York Stock Exchange adopted a rule requiring its member firms to charge their customers a service charge equal to 50% of the regular commission or $15.00, whichever was less, on the purchase or sale of securities in orders of 1,000 shares or less, but prohibited the member firms from paying commission to the Registered Representatives initiating the purchase or sale based on the amount of this service charge --

(1) Was not the prohibition against paying commission to Registered Representatives based on the service charge an agreement among competitors as to the price to be paid for the purchase of a service (the services of Registered Representatives) and, therefore, a _per se_ violation of the Antitrust Laws?

(2) Was the prohibition against paying commission to Registered Representatives based on the service charge exempt from the Antitrust Laws as being necessary to make the Securities Laws work?

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from a judgment of the United States District for the Southern District of New York (Ward, J.), dismissing the plaintiffs' Complaint and granting judgment in favor of all defendants (438A).* The case was tried non-jury and the decision of the Court below, which constituted the Court's Findings of Fact and Conclusions of Law for purposes of Rule 52 of the Federal Rules of Civil Procedure, is reported at 377 F. Supp. 86 (S.D.N.Y. 1974), and appears at Page 407A of the Joint Appendix.

Summary of Proceedings in the District Court

During the period from April 2, 1970 through March 24, 1972, the New York Stock Exchange (hereafter "NYSE") had in effect a Rule which required that the member firms of the NYSE charge their customers, in addition to the prescribed minimum commission, a service charge equal to $15 or 50% of the regular commission, whichever was less, on purchases or sales of securities in orders of 1,000 shares or less (276A). Through the operation of other provisions of the NYSE Constitution and the Rules and Regulations of the NYSE Board

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*References are to pages in the Joint Appendix filed in this Appeal.

of Governors adopted thereunder, the member firms of the NYSE were prohibited from paying commission to the salesmen in their employ (commonly referred to as Registered Representatives or Securities Representatives) based on the amount of this service charge (275A). The within action was instituted on behalf of a class defined as the Securities Representatives employed by the broker defendants during the period from April 2, 1970 through June 25, 1971 (46A) against the NYSE and several of its member firms* to recover commissions due them based on the amount of the service charge collected by their respective employers on transactions initiated by the members of the class. The basis on which relief is sought is that the provisions of the NYSE Constitution pursuant to which supposed competitors, the member firms of the NYSE, agreed or were required to act uniformly in the compensating of their Registered Representatives was a form of horizontal price fixing or price stabilization among competitors for the purchase of services (in this case the services of Registered Representatives) and therefore a _per se_ violation of Section 1 of the Sherman Act, 15 U.S.C.A. Section 1.

Defendants initially filed a motion in the District Court to dismiss the Complaint on the grounds that matters

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*The member firm defendants are referred to collectively in this Brief as the "broker defendants."

relating to the compensation of employees were exempt from the Antitrust Laws by reason of the labor exemption to the Antitrust Laws contained in Section 6 of the Clayton Act, 15 U.S.C.A. Section 17. This motion was denied by then District Judge Walter Mansfield who held that the Clayton Act labor exemption applied only in the context of a collective bargaining relationship which was not present here. See Cordova v. Bache & Co. Inc., 321 F. Supp. 600 (S.D.N.Y. 1970.)

Thereafter an order was entered permitting the action to be maintained as a class action, and individual notices were sent to the members of the class, as well as being published in The Wall Street Journal and New York Law Journal. (46A) Discovery was then completed following which the case came on for trial before the Honorable Robert J. Ward of the Southern District of New York. At trial there were three principal issues:

1. Did the provisions of the NYSE Constitution under which the member firms of the NYSE, including the broker defendants herein, were prohibited from paying commissions to their Registered Representatives based on the service charge constitute a per se violation of the Sherman Act? Judge Ward held in the negative. (436A)

2. Was there sufficient proof of damages to the members of the class to warrant an account-

ing if a violation were found? Judge Ward held in the affirmative. (425A - 426A)

3. Were the provisions of the NYSE Constitution under which the member firms of the NYSE were prohibited from paying commissions to their Registered Representatives based on the service charge exempt from the Antitrust Laws as being necessary to make the Securities Laws work? Judge Ward held that this arrangement "furthered the purpose of the Securities Laws." (436A)

HISTORY OF ADOPTION AND IMPLEMENTATION
OF THE SERVICE CHARGE

During the period from January 1, 1970 to February 17, 1971, the NYSE was organized as an unincorporated association. Effective February 18, 1971 it became organized as a corporation under the not-for-profit corporation law of the State of New York. During the entire period relevant to this litigation, the affairs of the NYSE were governed by a Board of Governors and, after February 19, 1971, by a Board of Directors of 33 members, 29 of whom were representatives of the NYSE member firms, 3 of whom were public members and 1 of whom was the President of the NYSE (69A). The basic governing law of the NYSE was and is its Constitution adopted by the members of the NYSE. Under this Constitution the Board of Governors, or now the Board of Directors, is

authorized and has adopted various Rules and Regulations which are binding on the member firms.

Prior to April 2, 1970, the Constitution of the NYSE, in Article XV, Section 1, required that the member firms charge and collect commissions at specified minimum rates for the execution of purchases and sales of securities on the Exchange (275A). In addition to requiring the collection of commissions, Article XV, Section 1 of the NYSE Constitution specifically prohibited the member firms of the NYSE from paying commissions to their employees out of the commissions collected by the member firms from their customers for executing transactions on the Exchange <u>unless</u> the payment of such commissions was specifically authorized by the Board of Governors. Thus Article XV, Section 1 provided, <u>inter alia</u>:

> "<u>No bonus or percentage or portion of a commission</u>, whether such commission be at or above the rates herein established, or any portion of any profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed, directly or indirectly, as a salary or portion of a salary, to a clerk or person <u>for business sought or procured for any member</u> or allied member of the Exchange or member firm or member corporation." (Emphasis supplied) (275A)

During this same period, i.e., immediately prior April 2, 1970, the NYSE Constitution also contained a provision authorizing the Board of Governors to provide for

the charging of "service charges." This was set forth in Article XV, Section 9 as follows:

> "Sec 9 Members of the Exchange, member firms and member corporations shall make and collect, in addition to minimum prescribed commissions, such other minimum charges with respect to accounts and services as the Board of Governors may from time to time prescribe. Except as may be specifically permitted by a rule adopted by the Board of Governors, such charges shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect, and no bonus or percentage of such charges, whether such charges be the minimum charges prescribed by the Board or greater charges shall be given, paid, or allowed, directly or indirectly, or as a salary or portion of a salary to a clerk or to any member of the Exchange, member firm or member corporation, or to any other person, firm or corporation for business sought or procured for any member of the Exchange, member firm or member corporation." (275A)

It should be noted that Article XV, Section 9, like Article XV, Section 1, prohibited the payment of commission to employees of the member firms based on any service charges collected <u>unless</u> specifically authorized by a Rule of the Board of Governors. It also should be noted that under Article XV, Section 9 a service charge itself could be adopted by a Rule of the Board of Governors whereas commission rates under Article 15, Section 1 could be adopted or changed only by amendment to the NYSE Constitution.

Immediately prior to April 2, 1970, no service charge adopted pursuant to Article 15, Section 9 was in effect.*

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*A detailed history of the service charges which had been adopted by the NYSE is set forth in Exhibit 63 (277A - 287A). The last service charge adopted prior to April 2, 1970 was in effect only from January 3, 1938 to January 12, 1938 (278A).

However, there were commission rates in existence established under Article XV, Section 1 and these commission rates formed the basic income of the member firms from executing transactions on the Exchange (58A - 59A). While under Article XV, Section 1 the paying of commissions to Registered Representatives out of the commissions collected by the member firms was prohibited unless authorized by a Rule of the Board of Governors (275A), the Board of Governors had exercised the authority to permit the payment of commissions to Registered Representatives out of the commissions collected by the member firms. This had been accomplished through the adoption of Rule 347(a) which provided as follows:

> "Rule 347(a) Pursuant to Section 1 of Article XV of the Constitution, registered representatives may be compensated as follows:
>
> (1) registered representatives-on a salary or a commission basis,
> (2) branch officer managers-on a salary or a commission basis, with the prior approval of the Exchange, they may receive a percentage of the net profit of the branch office,
> (3) a registered representative who is also head of a department of the organization-may, with prior approval of the Exchange, receive a percentage of the net profit of his department, and
> (4) bonuses-registered representatives may participate, with the prior approval of the Exchange, in bonus distributions." (276A)

Rule 347(a) contained no limitation on the amount of commission that could be paid to Registered Representatives and did not restrict the manner in which the commission paid to Registered Representatives could be computed. As a

result, prior to April 2, 1970, the situation which existed was as follows: Under Article XV, Section 1 the member firms were required to collect minimum commissions for executing transactions of the NYSE. They were prohibited from paying commission to their Registered Representatives based on the commissions so collected unless authorized to do so by the Board of Governors, but through Rule 347(a) full authority to compensate on a commission basis had been granted. As a result, there was no restriction on or regulation of the manner or method of compensating Registered Representatives based on the collection of the basic commission authorized under Article XV, Section 1. At the same time, Article XV, Section 9 authorized the Board of Governors to adopt service charges and prohibited the sharing of such service charges with Registered Representatives unless specifically authorized. There was no specific authorization for the sharing of service charges with Registered Representatives such as existed for the sharing of the basic commission under Rule 347(a), but, at the same time, since there was no service charge in effect, the prohibition against paying commissions based on service charges had no impact.

Commencing around the beginning of 1967, the NYSE undertook to study its commission rate structure (171A). To this end, the NYSE had retained the National Economic Research Associates, Inc. (hereafter "NERA") to study its commission rate structure (171A). In February of 1970, NERA submitted its report to the NYSE (76A, 173A). This report concluded that the member firms needed an increase in overall revenues from commissions in the amount of $438,000,000 per year and

suggested a new formula for computing commissions (176A). Upon receiving the NERA report, representatives of the NYSE submitted it to the Securities Exchange Commission (hereafter "SEC") for its review (76A, 151A - 152A). The representatives of the NYSE requested the SEC to act quickly on the proposed increase in commission rates as the member firms were in great need of additional revenue (153A).

Shortly after the NERA report was submitted to the SEC, it became apparent to the officials of the NYSE that the SEC would not be able to act quickly on the report (154A, 173A - 174A). At the same time the member firms of the NYSE were anxious for some immediate relief in the form of increased revenues, and felt that such relief could not be delayed for an extended period while the SEC studied the NERA proposal (156A). It was because of this desire for immediate relief that the idea of increasing commissions by adopting a service charge was conceived by the NYSE (155A, 175A - 177A).

Various formulas for an additional charge were considered by the Costs and Revenues Committee of the NYSE which were designed to produce the additional $438,000,000 per year which NERA had recommended, and it was finally concluded to seek approval from the SEC for an additional charge of $15 or 50% of the applicable commission, whichever was less, on purchases or sales of orders of 1,000 shares or less (177A - 178A). It was further determined by the representatives of the NYSE that

this additional charge would be implemented as a service charge under Article XV, Section 9 of the NYSE Constitution, rather than as a commission rate increase under Article XV, Section 1 of the NYSE Constitution because adopting the increase as a commission rate change would require an amendment to the NYSE Constitution, a procedure which would take 6 to 8 weeks, whereas a service charge could be put into effect by a Rule of the Board of Governors which would require only a meeting of the Board of Governors in order to adopt it (99A - 100A, 413A - 414A).

Pursuant to this decision, by letter dated March 16, 1970, the NYSE advised the SEC of its proposal for obtaining interim financial relief by means of adopting a service charge of $15 or 50% of the applicable commission, whichever was less, on orders of 1,000 shares or less (248A). In this letter the NYSE advised the SEC that the proposed order charge was being adopted under Article XV, Section 9 of the NYSE Constitution without a membership vote because of the need for "immediate interim relief" (250A).

Mr. David D. Huntoon, Associate Director of the Department of Member Firms of the NYSE, testified that on March 17, 1970, he was directed to draft the language for the proposed rule change which would put the service charge into effect. (78A - 79A) He thereupon prepared a proposed New Rule 383 and an amendment to existing Rule 347(a) (95A - 96A).

New Rule 383, as initially prepared by Mr. Huntoon, set forth the substance of the proposed service charge. Mr. Huntoon's proposed amendment to Rule 347(a) related to the right of Registered Representatives to be paid commission based on the service charge and would have added a provision authorizing the payment of commission out of the service charge (95A - 96A). Without this amendment, the prohibition against paying commission out of service charges contained in Article XV, Section 9 of the NYSE Constitution operated to prohibit the member firms from paying any portion of the service charge as commission to their Registered Representatives. Mr. Huntoon testified that he had prepared this amendment to Rule 347(a) because it was his understanding that commission was to be paid to Registered Representatives based on the service charge (96A - 97).

After Mr. Huntoon submitted his memorandum containing the foregoing proposed rules to his superiors, he was directed to prepare a new memorandum deleting the proposed amendment to Rule 347(a) (98A, 102A).

On March 19, 1970, the Board of Governors of the NYSE approved in principle, for resubmission at a future meeting, the proposed New Rule 383 covering the charging of the service charge (107A, 254A). The Board of Governors did not adopt or consider any amendment to Rule 347(a) or any other provision which would have permitted the paying of commission to Registered Representatives based on the

service charge.

Upon the adoption of the proposed New Rule 383 in principle, the NYSE circulated its members and notified them of the service charge proposal (108A, 255A). In so doing the NYSE specifically advised its members that the proposed service charge could not be shared with member firm Registered Representatives. This circular, which was dated March 19, 1970, stated *inter alia*:

> "Although firms should be aware that since this is a minimum service charge, the Exchange Constitution does not permit the charge to be shared in the form of compensation to member firm registered representatives, we would remind firms that they may continue to follow their individual policies in sharing minimum commissions with their sales personnel." (Emphasis supplied) (255A)

By letter dated April 2, 1970 the SEC notified the NYSE of its non-objection to the proposed service charge, but limited its approval of the service charge to an initial 90 day period (259A - 261A). As a result of this notification by the SEC of the terms of its non-objection to the service charge, the Board of Governors of the NYSE adopted a revised New Rule 383 with the 90 day limitation required by the SEC, in the following form:

> "Commencing April 6 through July 5, 1970, in addition to the minimum commission computed in accorance with the provisions of paragraph 2(a) of Article XV of the Constitution, each member organization shall charge and collect upon the execution on the Floor of the Exchange of any order for the purchase or sale for the account of a non-member or an allied member of 1,000 shares or less a service charge equal to not less than the

> lesser of $15 or 50% of such minimum commission. For the purposes of this Rule, an order shall be deemed to include all purchases or sales for one account of round lots or odd lots or both of a single security, on the same day, pursuant to a single order. While this charge is in effect, transaction size and other limitations generally imposed since April 1, 1969, by a member organization on small orders shall be suspended." (288A)

Prior to the SEC notifying the NYSE of its non-objection to the adoption of the proposed service charge, the staff of the SEC ran its own tests and studies of the impact of the propsed service charge. In this regard, the SEC specifically tested the impact on the profitability of certain sample firms which would result from a service charge of $5, $10, and $15. In so doing, the staff of the SEC <u>assumed that one-third of the additional revenues produced might be passed on to the Registered Representatives in the form of commissions and not be available to the member firms</u> (310A). Even with this assumption the SEC indicated its non-objection to the proposed service charge.

Since the service charge was initially adopted for a period of only 90 days, it was scheduled to expire in the beginning of July 1970. As the expiration date approached, the SEC still had not acted on the NYSE's request for a commission rate change. Accordingly, in June of 1970 the NYSE applied to the SEC for an extension of the service charge beyond the original 90 day period (115A). By letter dated July 7, 1970, the SEC indicated its non-objection to

an indefinite extension of the service charge beyond the original 90 day period on the condition that it would expire at any time the SEC might require (264A). The Board of Governors of the NYSE immediately adopted an amendment to Rule 383 to meet this requirement. Under this provision, the service charge remained in effect until March 23, 1972 when it was terminated and replaced by a revised commission rate schedule (60A).

During the entire period that the service charge was in effect, each of the broker defendants herein collected the service charge on transactions to which it was applicable but none paid commissions to their Registered Representatives based on the service charges so collected (417A). The funds received by the broker defendants from the service charge were used as part of the general operating revenues of the broker defendants.

By telegram dated May 19, 1970, an organization known as Association of Investments Brokers requested the SEC to cause the NYSE to direct all member firms to share the interim service charge as commissions with the Registered Representatives. By letter dated June 22, 1970, Hamer H. Budge, then the Chairman of the SEC, responded to this telegram stating, _inter alia_:

> "The Commission has not interfered with the various compensation arrangements which the member firms have with their salesmen. _We believe that this is a matter of determination by each firm with its registered representatives_

subject only to the qualification that they act prudently to improve their operations and financial condition where such action is warranted." (Emphasis supplied) (322A)

In July of 1970, following the SEC's non-objection to the indefinite extension of the service charge, the SEC reconvened hearings which it had been holding on the commission rate structure of the securities industry. In the July hearings it dealt specifically with the question of whether the service charge should continue to be extended. Mr. Merrill J. Chapman, President of the Association of Investment Brokers, testified at these hearings. In the course of his testimony he started to raise objection to the SEC's failure to provide that Registered Representatives be paid commission on the service charge. At this point he was advised by Mr. Nicholas K. Wolfson, Assistant Director, Division of Trading and Markets of the SEC, that the SEC had taken no position on whether the service charge could or could not be shared with Registered Representatives (323A - 324A).

Mr. Sam Cordova, President of the American Association of Securities Representatives, also testified at the hearings before the SEC in July of 1970. In the course of his testimony he also was advised by Mr. Wolfson that the SEC had taken no position on whether Registered Representatives could or could not be paid commission based on the service charge (325A - 326A).

ARGUMENT

POINT I

The Rule Which Prohibited The Member Firms of The NYSE From Paying Commissions To Their Registered Representatives Based on The Service Charge Was a Price Fixing Scheme And Therefore A *Per Se* Violation Of Section 1 Of The Sherman Act

In *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 355 (1963), the Supreme Court established the principle that exemption of the securities industry from the Antitrust Laws would be implied "... only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357,83 S.Ct. at 1257. The Court approached the application of the Antitrust Laws to the securities industry by first considering whether the conduct in question was a violation of the Antitrust Laws *absent* any basis for exemption, and then, if so, determining whether there was a basis for antitrust exemption. We will follow that analytical process in this Brief, and demonstrate in this Point I that the NYSE prohibition against paying commission to Registered Representatives based on the service charge was a violation of the Antitrust Laws absent any basis for antitrust exemption, and then, in Point II discuss why there is no basis for

exemption from the Antitrust Laws under the circumstances of this case.*

Section 1 of the Sherman Act, 15 U.S.C. 1, declares to be illegal "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce ..." (Emphasis supplied). In applying the Sherman Act the Supreme Court has recognized a dichotomy between cases governed by the "rule of reason" and restraints which are "per se" violations of the Act. See Northern Pacific Railroad Company v. United States, 356 U.S.1, 78 S.Ct. 514(1953). Judicial experience in the interpretation and application of the Sherman Act has led to an increasing application of the per se rule of liability, particularly where the restraints were horizontal, as distinguished from vertical, in character. See United States v. Topco Associates, Inc. 405 U.S. 596, 92 S.Ct. 1126 (1972).

Ever since the decision in United States v. Trenton Potteries Company, 273 U.S. 392, 47 S.Ct. 377 (1927), it has been established law that price fixing is a per se

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*The case was tried in the court below solely on depositions and documentary exhibits. There were no live witnesses. Accordingly, this Court, in reviewing the decision below, is free to make its own findings and interpretation of the evidence without being restricted by the "clearly erroneous" test. See, e.g., United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321 (1966); United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525 (1948); Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2nd Cir. 1965)

violation of the Sherman Act. The rule that price fixing is a per se violation has been applied to all forms of price fixing, no matter how subtle, no matter how small the impact on competition and without regard to how indirect may be the actual effect on price. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in inter-state or foreign commerce is illegal per se" United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S.Ct. 811, 844 (1940). An agreement fixing maximum or minimum prices is illegal even though it does not restrain competition as much as an agreement which fixes the specific price at which goods are purchased or sold. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259, rehearing denied, 340 U.S. 939, 71 S.Ct. 487 (1951), Quinn v. Mobil Oil Co., 375 F. 2d 273 (1st Cir. 1967), cert. denied, 389 U.S. 801. But "absent some 'immunity bath', all price fixing is illegal, if within the purview of the Federal antitrust laws, regardless of whether the prices fixed be wholesale or retail, maxima or minima." Crane Distributing Co. v. Glenmore Distilleries, 267 F. 2d 343, 345 (6th Cir. 1959).

Fixing the price to be paid for labor is no different from fixing the price to be paid for any other commodity. As Judge Mansfield noted in his opinion denying the defendants' motion to dismiss in the instant case:

> "There can be little doubt about the fact that if a group of employers, as the complaint here alleges, were allowed, not as part of a collective bargaining agreement, to agree together to reduce the commissions paid to their respective employees, they would have the same power to restrain competition as is inherent in a price-fixing agreement." Cordova vs. Bache & Co., 321 F.Supp. 600, 606 (S.D.N.Y. 1970)

Arguments to the effect that the prices fixed by a particular price fixing scheme were "reasonable," or that price fixing was necessary to eliminate some real or imagined competitive evil repeatedly have been rejected in favor of the *per se* test of liability. See *United States v. Socony-Vacuum Oil Company*, supra, 310 U.S. at 218, 220, 60 S.Ct. at 842-843. The "rule of reason" does not apply to price-fixing because the evil of a price-fixing scheme lies not in the price that is fixed but in the scheme's interference with the free play of market forces. It is this interference which the Sherman Act proscribes. As the Supreme Court stated in *United States v. Socony-Vacuum Oil Company*, supra, 310 U.S. 221-222, 60 S. Ct. at 843;

> "Any combination which *tampers* with price structures is engaged in unlawful activity. Even though the members of the price-fixing group were in no position to control the market, *to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference*. Congress has not left with us the determination of whether or not particular price-fixing schemes

are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination." (Emphasis supplied)

The per se test of antitrust violation is not limited to price fixing schemes alone. Rather, it applies to all horizontal agreements in restraint of trade for all horizontal agreements interfere with the "free play of market forces." This was made clear by the Supreme Court in its recent decision in United States v. Topco Associates, Inc., supra, where the Court held that territorial allocations for the sale of certain products constituted a per se violation of Section 1 of the Sherman Act because the restraints were horizontal in character. The Court's rationale is illuminating in its simplicity, for it based its conclusion that there was a per se violation solely on the fact that the restraint was horizontal. Said the Court, 405 at 608, 92 S.C. at 1134:

> "We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a per se violation of Section 1" (Emphasis supplied).

See also Worthen Bank & Trust Co. v. National Bank Americard, Inc., 345 F.Supp. 1309, 1320-1321 (E.D. Ark. 1972).

In the instant case, the Court below refused to hold that United States v. Topco Associates Inc., supra, barred as per se violations all horizontal agreements in restraint

of trade. Rather, the Court below limited the applicability of United States v. Topco Associates Inc., supra, to cases involving territorial restrictions (430A) and stated that the "rule of reason" often has been applied to horizontal agreements, relying on cases of such ancient vintage* as to have little current value in light of more recent decisions giving broader application to the per se test, e.g. Northern Pacific Railroad Company v. United States, supra. While recognizing that the per se rule of antitrust violation has been applied to price-fixing schemes, the Court below held that it was applicable only where the arrangement was price fixing "on its face" (431A-432A). In this regard, the Court below stated that if the arrangement did not constitute price fixing "on its face" then the "rule of reason" test applied rather than the rule of per se liability (432A). The Court below then concluded that the NYSE rule which prohibited paying commissions to Registered Representatives based on the service charge was not a price fixing scheme "in purpose" and therefore antitrust liability was governed by the rule of reason, rather than by the per se test (433A-434A). We submit that the Court below erred in both its rationale and in its conclusion.

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*The Court below cited Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502 (1911), United States v. American Tobacco Co., 221 U.S. 106 (1911) and Chicago Board of Trade v. United States, 246 U.S. 231 (1918) for the proposition that the rule of reason was applicable to horizontal agreements (430A-431A).

The holding of the Court below that the rule of per se liability applies only where the purpose of an arrangement is price fixing "on its face" clearly is not the law. Rather, as the Supreme Court stated in United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 221, 60 S.Ct. at 843, the Sherman Act proscribes "any combination which tampers with price structures." One of the principle reasons for having per se rules is to avoid the necessity for a court having to inquire into the purpose for or reasonableness of a particular arrangement. See Northern Pacific Railroad Company v. United States, supra, 356 U.S. at 5, 78 S.Ct. 514 (1958), United States v. Topco Associates Inc., supra. The inquiry is not whether a particular arrangement has as its "purpose" the fixing of prices, but rather, whether the arrangement "tampers" with the price structure United States v. Socony-Vacuum Oil Co., supra. If the latter, then there is a per se violation and the purpose for the arrangement, its reasonableness, or any other attempted justification for it are of no moment. It is the act of tampering with the free play of market forces controlling price structure that constitutes the violation of the Sherman Act. United States v. Socony-Vacuum Oil Company, supra.

The Sherman Act is concerned with "means, not "ends". What may be the reasonable price of today may become the unreasonable price of tomorrow. See United States v. Trenton Potteries Company, supra, 73 U.S. 397, 47 S. Ct. at 379.

The economic judgment ordained by the Sherman Act is that price is to be determined by the free play of the market forces of supply and demand. The Sherman Act prohibits interference with the operation of these market forces. United States v. Socony-Vacuum Oil Company, supra. Thus, the test of antitrust liability is not whether the purpose of an arrangement is price fixing "on its face" but whether the arrangement limits or restricts the ability of competitors to act independently and in accordance with their own judgments. See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra, 340 U.S. at 213, 71 S.Ct. at 260. It follows that the test which the Court below should have applied is not whether the purpose of the rule which prohibited paying commission based on the service charge was intended to fix the compensation of Registered Representatives, but rather, whether it "tampered" with the ability of the individual member firms to exercise their own judgment in the compensation of their Registered Representatives.

It is immediately apparent from the evidence in the record that the rule which prohibited the paying of commissions to Registered Representatives based on the service charge constituted a "tampering" with the compensation which the member firms could pay their Registered Representatives. It is admitted in the pleadings that all the broker defendants compensated the Registered Representatives in their employ on a commission basis, with the com-

mission being a percentage of the commission which the broker defendants themselves received for the execution of a purchase or sale of securities on the floor of the Exchange.* Thus, under their individual employment arrangements, each member of the class was entitled to a commission at a specified rate on the commissions which he earned for his employer. Article XV, Section 1 of the New York Stock Exchange Constitution prohibited the paying of commissions to Registered Representatives based on the commission collected by the member firms, unless the payment of such commission was authorized by a rule of the Board of Governors (275A). Absent such a rule by the Board of Governors, Article XV, Section 1 clearly would constitute a "tampering" with the compensation payable by the member firms to their Registered Representatives. However, Rule 347(a) of the Board of Governors (276A) permitted the paying of commission to Registered Representatives and, therefore, nullified the restrictive effect of Article XV, Section 1 of the NYSE Constitution. Article XV, Section 9 of the NYSE Constitution similarly prohibited the paying of commission to Registered Representatives based on the service charges collected by the member firms, unless authorized by a rule of the Board of Governors(275A). In thus restricting the manner in which the member firms could compensate their

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*See paragraph 8 of Answer of defendant Bache & Co. Inc. (38A). Only one Answer of the broker defendants has been printed in the Joint Appendix but all the Answers are substantially identical and all the broker defendants admit that they collect commission for executing transactions and compensate their Registered Representatives on a commission basis.

Registered Representatives, Article XV, Section 9 also constituted a "tampering" with the compensation structure which the various member firms could have with their Registered Representatives. Since, however, immediately prior to April 2, 1970 there was no service charge in effect, the limitation contained in Article XV, Section 9 was of no moment. However, with the adoption of Rule 383 effective April 6, 1970, and the collection by the member firms of the service charge thereunder, the restriction contained in Article XV, Section 9 had an immediate effect of tampering with the compensation structure which the member firms could have with their Registered Representatives.* This was particularly significant in the instant case because of the admitted fact that the increase was adopted as a service charge, rather than as a commission rate increase, only because the service charge could be implemented quickly, while an increase in commission rates would have required amendment of the NYSE Constitution (99A-100A, 155A, 175A-177A, 250A, 413A - 414A). Since the service charge was, admittedly a form of commission rate increase, had it been adopted as such then the members of the class, under their individual employment arrangements, would have been entitled to commission on it.

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*That there was direct tampering with the member firm compensation structures is borne out by the fact that the NYSE immediately circularized its member firms and advised them that they could not pay commission on the service charge (255A).

Since Article XV, Section 9 of the NYSE Constitution prohibited the payment of "any portion" of a service charge to a Registered Representative, it constituted at least a partial fixing of the compensation which could be paid to Registered Representatives, and, quite obviously, was a tampering with their compensation structures and an interference with the ability of the individual member firms to exercise their own judgment on how they would compensate their Registered Representatives. It thus was a price fixing scheme, and illegal per se even though the actual compensation paid to Registered Representatives was not fixed and without regard to whether competition for the services of Registered Representatives was diminished* or the reasonableness or purpose of the restriction. Accordingly, the holding of the Court below that the rule prohibiting the payment of commission based on the service charge was not a per se violation of the Antitrust Laws is in error and should be reversed.

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*In the decision below the statement is made at one point that "the parties do not dispute that competition (for the services of registered representatives) was in fact intense" (412A), and, subsequently, that during the period the service charge was in effect "competition for the services of the registered representatives continued unabated" (417A and 433A). There is not a scintilla of evidence in the record to support these statements. Since the case was tried on a theory of per se liability, no evidence was offered by either side on the degree of competition among member firms for the services of Registered Representatives.

POINT II

The Rule Prohibiting Payment of Commissions To Registered Representatives Based On The Service Charge Was Not Necessary For "Investor Protection" And Therefore Not Exempt From The Antitrust Laws

In Silver vs. New York Stock Exchange, 373 U.S. 341 (1963), the Supreme Court set forth the guidelines for determing the extent to which the rules and practices of the New York Stock Exchange might be exempt from the Antitrust Laws by reason of the powers granted to securities exchanges under the Securities Exchange Act of 1934. In Silver, the Court established as the basic principle that exemption was to be found only to the extent necessary to make the Securities Exchange Act work. Said the Court, 373 U.S. at 357, 83 S. Ct. at 1256:

> "The Securities Exchange Act contains no express exemption from the antitrust laws, or for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '(i)t is a cardinal principle of construction that repeals by implication are not favored.' United States v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 188, 84 L. Ed. 181; see Georgia v. Pennsylvania R. Co., 324,U.S. 439, 456-457, 65 S. Ct. 716, 725-726, 89 L. Ed. 1051; California v. Federal Power Comm., 369 U.S. 482 82 S. Ct. 901, 903, 8 L. Ed. 2d 54. Repeal is to

be regarded as implied only if necessary to make the Securities Exchange Act Work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." (Emphasis supplied)*

In Silver vs. New York Stock Exchange, supra, the Supreme Court viewed the problem as one of the reconciling the broad policies of the Antitrust Laws, which were intended to eliminate restraints on competition, with the more specific regulatory purposes of the Securities Exchange Act in providing investor protection by permitting securities exchanges to engage in "self-regulation" even though such self-regulation might have anti-competitive effects, 373 U.S. at 349, 83 S. Ct. 1252-1253. In making this reconciliation, the Court made it clear that the Securities Exchange Act did not confer any broad antitrust exemption; rather, such exemption was to be determined only by an analysis which would reconcile both statutory schemes with one another, rather than holding one

*In Silver vs. New York Stock Exchange, the NYSE had directed its member firms to discontinue certain private wire connections which they had with the plaintiff, a broker-dealer who was not a member of the NYSE. This was done unilaterally without any prior notice to the plaintiff and without affording him opportunity for

completely ousted, 373 U.S. at 357, 83 S. Ct. 25 1257. It was in the context of this analysis that the Court concluded that exemption might exist only to the minimum extent necessary to make the Securities Exchange Act work, 373 U.S. at 357, 83 S. Ct. 1257.

The Supreme Court reiterated and expanded upon the principle of the Silver case in its recent decision in Merrill,Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 94 S. Ct. 383 (1973). While Ware presented the problem in the context of determining the extent to which exchange self-regulation might pre-empt State law, rather than the Antitrust Laws, the Court noted that the analytical approach to the question was the same, i.e., was the Exchange activity in question necessary for "investor protection", see 414 U.S. at 126-127, 94 S. Ct. at 389-390. Emphasizing that the purpose of the Securities Exchange Act was to insure fair dealing in securities and provide investor protection, the Court said, 414 U.S. at 130, 94 S. Ct. at 391:

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a hearing, see 373 U.S. at 344, 83 S. Ct. at 1250. The Court concluded that the manner in which the plaintiff's wire service had been cut off without notice and a hearing was so basically unfair as to preclude justifying it as being necessary to make the Securities Act work. Since the NYSE had exceeded its authority under the Securities Act, it could not claim antitrust exemption for such conduct as being necessary to its functions under the Act, 373 U.S. at 364, 83 S. Ct. at 1260-1261.

"It is thus clear that the congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices. To the extent that any exchange rule or practice contravenes this policy, or any authorized rule or regulation under the Act, the rule may be subject to appropriate federal regulatory supervision or action. Correspondingly, any rule or practice not germane to fair dealing or investor protection would not appear to fall under the shadow of the federal umbrella; it is instead, subject to applicable state law." (Emphasis supplied.)

The Court also noted, on a point which is of great importance here, that SEC jurisdiction and exemption from other laws, whether such other laws be state law or the Antitrust Laws, are but opposite sides of the same coin. If the activity in question is not one over which the SEC has review power under Section 19(b) of the Securities Exchange Act, 15 U.S.C., Section 78s(b), then such activity would "kindle no federal curiosity", 414 U.S. at 129, 94 S. Ct. at 391, and would not be exempt from the application of other laws. The test of SEC jurisdiction, like the test of antitrust or State law exemption, is whether the regulation in question is necessary to insuring fair dealing in securities and investor protection. Said the Court, 414 U.S. at 129, 94 S. Ct. at 391:

"...Apart from its responsibilities in registering exchanges, the Commission may 'alter or supplement' the rules of an exchange if such action is necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." (Emphasis supplied)

In Ware the question before the Court was whether a Rule of the NYSE which required Registered Representatives to submit disputes with their employers to arbitration could supercede and pre-empt a law of the State of California which provided that agreements to arbitrate such disputes did not preclude private suits through the courts. The Court held that the NYSE requirement that such disputes be submitted to arbitration was not necessary for "investor protection" and, therefore did not pre-empt State law. The particular NYSE Rule involved in Ware was sub-section (b) of Rule 347 and, since the dispute in the instant case arises from the defendants' failure to amend sub-section (a) of Rule 347 to authorize payment of commissions based on the service charge, the Supreme Court's approach in Ware to the subject matter of Rule 347, which deals generally with relations between member firms and their Registered Representatives, is of importance to the disposition of the instant case. Said the Court, 414 U.S. at 135, 94 S. Ct. at 393-394:

"To begin with the obvious, there is nothing in the Act and there is no Commission rule or regulation that specified arbitration as the favored means of resolving employer-employee disputes. It is also clear that Rule 347(b) would not be subject to the Commission's modification or review under §19(b). The United States, as amicus, concedes as much, and we conclude, as the Government suggests, that the relationship between compulsory employer-employee arbitration and fair dealing and investor protection is 'extremely attenuated and peripheral, if it exists at all.'" (Emphasis supplied)

However "attenuated and peripheral" may have been the relationship between compulsory arbitration and investor protection in the Ware case, there is absolutely no relationship between the rule prohibiting payment of commission based on the service charge and investor protection in the instant case. This appears from the statements of the SEC itself. It is of the utmost significance to the dispostion of the instant case that prior to the institution of this suit, efforts were made by organizations representing Registered Representatives to obtain relief through the SEC, but the SEC declined to take jurisdiction unless it could be demonstrated that action on its part was necessary for "investor protection."

Shortly after the service charge was adopted, the Association of Investment Brokers, an organization of Registered Representatives sent a telegram to the SEC requesting

that it cause the NYSE to direct the member firms to share the service charge with Registered Representatives. The then Chairman of the SEC, Hamer Budge, replied that compensation of Registered Representatives was not a matter over which the SEC had jurisdiction, in the absence of it being demonstrated that SEC action was necessary for investor protection. In a letter dated June 22, 1970, Chairman Budge stated:

> "The Commission has not interferred with the various compensation arrangements which firms have with their salesmen. We believe that this is a matter for determination by each firm with its registered representatives subject only to the qualification that they act prudently to improve their operations and financial condition where such action is warranted. However, as always, the Commission stands ready to receive evidence from interested persons which demonstrates, with particularity, that additional regulatory action on our part is necessary or appropriate for the protection of investors." (Emphasis suspplied) (322A).

This letter from Chairman Budge serves to highlight three important points. First, the SEC recognized that its jurisdiction lay only in the area of investor protection. Second, the SEC saw no relationship between Registered Representative compensation and investor protection which would warrant its asserting jurisdiction. Third, it viewed

the matter as being one for determination between _each firm_ and its Registered Representatives, rather than being a proper subject of SEC review or exchange self-regulation.

In the instant case the Court below made no determination as to whether the prohibition against paying commissions based on the service charge was necessary for investor protection. Moreover, the Court below did not hold that the plaintiffs' antitrust claims lay either within the "exclusive" or "primary" jurisdiction of the SEC. Rather, the Court below proceeded on the theory that both the courts and the SEC had "concurrent" jurisdiction of plaintiffs' antitrust claims and that the Court should exercise its share of this "concurrent" jurisdiction because the SEC had declined to act for the reasons set forth in Chairman Budge's letter of June 22, 1970 (423A).

The "concurrent" jurisdiction approach of the Court below was based, in large part, on the decision of the Seventh Circuit in _Thill Securities Corp. vs. New York Stock Exchange_, 433 F. 2d 264 (7th Cir. 1970), _cert. denied_, 401 U.S. 994, 91 S. Ct. 1232 (1971). While _Thill_ has been cited with approval by this Court, see _Breen Air Freight, Ltd. v. Air Cargo, Inc_. 470 F. 2d 767 (2nd Cir. 1972), its authority,

at least insofar as it supports the "concurrent" jurisdiction theory, was substantially limited by this Court's recent decision in Gordon vs. New York Stock Exchange, 498 F. 2d 1303 (2d Cir. 1974). The Gordon case was decided after the decision below in the instant case and, as a result, Judge Ward did not have the benefit of this Court's views as expressed in Gordon when he decided the instant case.

In Gordon the issue was whether the establishing of a minimum fee schedule to be charged by the member firms of the NYSE to their customers for executing transactions on the NYSE was exempt from the Antitrust Laws. This Court held that the establishing of such minimum commissions was exempt from the Antitrust Laws because it was subject to direct review by the SEC under Section 19(b)(9) of the Act, 15 U.S.C. Section 78s(b)(9), and also because of the extensive legislative history indicating that Congress intended that security exchanges have the power to set minimum fee schedules, see 498 F. 2d at 1306. The commission rates involved in the Gordon case were the commission rates which the member firms charge their customers for executing transactions on the Exchange, not the commission rates here involved which are

the rates of compensation paid to Registered Representatives for initiating such transactions. There is no direct authority given to the SEC in Section 19(b) of the Act to review Registered Representative compensation practices, nor is there any legislative history indicating that Congress intended that securities exchanges have the power to set compensation practices for the member firms. Accordingly, just as this Court recognized that Gordon was a "different case" from Silver, see 498 F. 2d at 1305, so too the instant case is a "different case" from Gordon. However, while the facts of the cases are different the analysis followed in Gordon, which relied principally on Silver and Ware, supports the conclusion that there is no basis for antitrust exemption in the instant case.

In Gordon, this Court emphasized that the Security Exchange Act was designed to insure fair dealing in securities and to provide protection to investors, 498 F. 2d at 1306, 1307, 1310. Therefore, any exchange activity reasonably related to achieving these objectives was within the review jurisdiction of the SEC and, *a fortiori*, exempt from the Antitrust Laws. In determining the scope of this exemption, the Court held that those matters covered by Section 19(b) of the Securities Exchange Act were, by definition, subject to SEC review and, therefore, exempt from the Antitrust Laws,

498 F. 2d at 1306. Other forms of exchange self-regulation which, while perhaps not within the "core of antitrust immunity", 498 F. 2d at 1310, were closely related to "investor protection" also may be within the scope of SEC review and thereby obtain antitrust immunity. However, the Gordon decision rejected the idea of "concurrent" jurisdiction. Rather, the question of antitrust exemption was tied directly to the question of SEC jurisdiction and whether or not the SEC provided an avenue for review of the activity in question. This Court reasoned that one of the bases for the finding of no antitrust exemption in Silver vs. New York Stock Exchange, supra, was the Supreme Court's conclusion that Silver had no remedy available to him through the SEC, and therefore should not be deprived of his antitrust remedy, see 498 F. 2d at 1305. Accordingly, as to matters which were within the review jurisdiction of the SEC, this Court held that judicial review was to be obtained through the provisions of the Administrative Procedure Act, 5 U.S.C. Section 702, 704, or in the case of SEC orders, under the provisions of 15 U.S.C. Section 78y, see 498 F. 2d at 1311. If particular exchange regulating activity were not subject to SEC review because not related to investor protection, then there also would be no basis for antitrust exemption. The important point is that

under the Gordon decision, there is to be no area of "no-man's land" where particular exchange regulatory activity would not be subject to SEC jurisdiction and yet still be entitled to antitrust exemption. It follows that the decision below insofar as the Court proceeded on the "concurrent" jurisdiction theory is in error and should be set aside.

Under the Silver, Gordon and Ware decisions, the test of both SEC jurisdiction and antitrust exemption is the same. Is the regulatory activity in question related to investor protection and insuring fair dealing in securities? In the instant case, we know the SEC's view on this question. It declined jurisdiction to review member firm compensation practices in the absence of a showing that the action by it was necessary for the "protection of investors" (322A). It further stated that the compensation of Registered Representatives was a matter for determination by the individual firms (322A). Since the SEC is the agency which must be considered to be the expert on the type of exchange self-regulation that is necessary for investor protection, its statement that the compensation practices of the member firms were a matter for the individual determination of the member firms compels the conclusion that the rule prohibiting payment of commissions based on the service charge was not necessary for "investor protection" or "to make the Securities Exchange Act work".

Undoubtedly the defendants will argue that the rule prohibiting the payment of commissions based on the service charge was necessary for investor protection because many of the member firms were losing money and in danger of going out of business with consequent losses to investors, and, therefore, it was necessary that all the money collected from the service charge be retained by the member firms. However, this argument does not stand up under an analysis of the facts. If the rule prohibiting payment of commissions based on the service charge was necessary to improve the financial position of the member firms, then how can the defendants possibly justify the statement which appeared in the March 19, 1970 circular advising the member firms that they were free to make their own determinations as to the payment of commission out of the basic commission (255A)? Even assuming that improving the financial position of member firms was necessary for investor protection, was prohibiting the payment of commissions based on the service charge without a similar prohibition limiting the amount of commission payable out of the basic commission a reasonable means of insuring that the monies generated by the service charge would be retained by the member firms? Can limiting the compensation of Registered Representatives be considered a reasonable means of providing investor protection without there also being a limitation on other expenditures made by member firms? If regulation of the compensation of Registered

Representatives was necessary for investor protection, why not was regulation of the compensation paid to other employees such as clerks, secretaries, researchers and the like also not adopted as being necessary for investor protection? The fact is that if the NYSE was really concerned with the retention of funds by the member firms for investor protection, then it could have adopted direct provisions requiring reserves and limiting <u>all</u> types of expenditures in order to directly accomplish this purpose. The claimed relationship between prohibiting the payment of commissions based on the service charge and the retention of funds within the member firms for investor protection is the type of "attenuated and peripheral" relationship which the Supreme Court rejected in <u>Ware vs. Merril Lynch, Pierce, Fenner & Smith</u>, supra, 414 U.S. at 135, 94 S.Ct. at 394.

The fact is that the NYSE was in the process of seeking a commission rate increase for the benefit of its member firms long before the crunch of early 1970 created a need for immediate relief. Registered Representatives employed by the member firms had expected that they would share in this increase in commission rates when it came just as they had shared in past increases. Just as the member firms were suffering from declining revenues due to the combined effects of a decline in the volume of transactions on the exchange and a broad decline in the price of stocks (with a consequent decline in the amount of commission collected on individual transactions), so too the individual representatives were suffering from a substantial reduction in

their own incomes due to the same factors. The assumption that Registered Representatives would be allowed to share in the increase in commission rates was not without foundation. The SEC itself assumed that Registered Representatives would receive one-third of the revenues generated by the service charge when it ran its own tests on it (310A). Mr. David D. Huntoon, Associate Director of the Department of Member Firms of the NYSE, testified that when he originally drafted an amendment to Rule 347(a) to authorize the payment of commissions based on the service charge, he did so because it was his understanding that commission was to be payable on the service charge (96A - 97A). Considering the reasonable expectations of the Registered Representatives that they would share in whatever commission increase the SEC authorized, it would have been difficult for the member firms to resist the pressure from their Registered Representatives to be paid commission based on the service charge unless there was some uniform rule against paying commissions on the service charge which was applicable to all of the member firms.

Not all the member firms were in bad financial straits (302A). Many could have paid commission on the service charge and still be profitable if permitted to act independently and exercise their own judgment on the matter. Individual Registered Representatives with their own followings might

have sought employment with those firms that were willing to pay commission based on the service charge, employment which would have been readily obtained if the Registered Representative were able to bring an increased volume to the firm. The NYSE's refusal to amend Rule 347(a) to provide for the payment of commissions to Registered Representatives based on the service charge made it possible for the member firms to resist this pressure from their Registered Representatives for increased compensation without being subject to the danger that individual Registered Representatives might choose to take their customers to a competitor who might be willing to pay commission based on the service charge. This was the purpose for and the direct and immediate effect of the prohibition against the payment of commissions based on the service charge. It was not a regulation designed for the purpose of investor protection; rather it was a regulation designed to protect the member firms from the effects of competition with each other. As such it was not "necessary to make the Securities Exchange Act work" and, therefore, not exempt from the antitrust laws.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision below should be reversed, that judgment should be entered in favor of the plaintiffs and the members of the class on the issue of liability, and the case remanded to the District Court for the determination of damages.

Respectfully submitted,

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Of Counsel:

Charles Sovel

Affidavit of personal service

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74-2001

In The

United States Court of Appeals

For The Second Circuit

L. JOHN JACOBI and ROBERT GAMBERA, individually, on behalf of the members of the AMERICAN ASSOCIATION OF SECURITIES REPRESENTATIVES, and on behalf of all other securities representatives similarly situated,

Plaintiffs-Appellants,

vs.

BACHE & CO., INC.; WALSTON & CO., INC; THOMSON & McKINNON AUCHINCLOSS, INC. (formerly THOMSON & McKINNON, INC.); HORNBLOWER-WEEKS, HEMPHILL, NOYES; LOEB, RHOADES & COMPANY; TUCKER ANTHONY & R. L. DAY; HARRIS, UPHAM & CO., INC. DOMINICK INT'L. CORP.; HALLE & STIEGLITZ, INC.; GOODBODY & CO., INC; BEAR, STEARNS & CO.; LEHMAN BROS.; KIDDER PEABODY & CO., INC.; R. W. PRESSPRICH & CO., INC.; DEAN WITTER & CO., [illegible]C.; W. E. HUTTON; REYNOLDS & CO.; PAINE, WEBBER, JACKSON & CURTIS; SCHEINMAN, HOCKSTIN & TROTTA, INC.; PRESSMAN FROLICH & FROST, INC.; NEWBURGER, LOEB & CO.; RAUSCHER, PIERCE SECURITIES CORP.; OPPENHEIMER & CO.; STEINER ROUSE & CO., INC.; L. F. ROTHSCHILD & CO.; SPENCER TRASK & CO.; SMITH BARNEY & CO., INC.; and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Respondents.

Index No.

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against

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 27th day of Sept. 1974 at see attached

deponent served the annexed Appellants Brief upon

(see attached)

the in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 27th

day of Sept. 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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